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NO.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

C. MACK CAIN
Petitioner,

v.

THE COMMONWEALTH OF
VIRGINIA, et al.,
Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Whether the placement of a grievance panel member who had previously participated in the decision to terminate the petitioner from state employment violated the petitioner's right to procedural due process by denying him an impartial decision maker.

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The petitioner, C. Mack Cain respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals For the Fourth Circuit entered on November 16, 1984.

OPINION BELOW

On November 16, 1984, the Court of Appeals entered an order, denying petitioner's motion for rehearing in banc and reversed the District Court's entry of summary judgment which held that petitioner was denied procedural due process by being deprived of an impartial decision maker in a state employee grievance proceeding as a matter of law. A copy of that judgment and opinion is contained in the appendix.

In an opinion rendered on October 5, 1984, the Fourth Circuit Court of Appeals reversed the District Court's award of summary judgment to petitioner. Its judgment was entered on October 5, 1984.

JURISDICTION

The jurisdiction of this court is invoked under Title 28 United States Code Section 1254.[1]

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[1] A listing of all parties-respondent not shown on the caption of the case on this petition is as follows: Joseph L. Fisher, Sec. Dept. of Human Resources; Altamont Dickerson, Jr., Com., Dept. of Rehabilitative Services; Charles H. Merritt, Com. of Client Services, Dept. of Rehabilitative Services; James V. Snow, Reg. Dir., Dept. of Rehabilitative Services; Harold W. Billings, Program Supr., Dept. of Rehabilitative Services; Kenneth D. Smith, Program Supr., Dept. of Rehabilitative Services; and, Mary O'Hare, SW Reg. Office, Dir., Division of Disability Determination.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, Amendment XIV:

> "...nor shall any state deprive any person of life, liberty or property without due process of law...".

Virginia Code Annotated Section 2.1-114.5:1(D)(4) (Cum. Supp. 1983):

> Qualifying grievances shall advance to the final step which shall provide for a hearing before an impartial panel, such panel to consist of one member appointed by the grievant, one member appointed by the

agency head and a third member selected by the first two. In the event that agreement cannot be reached as to the final panel member, the chief judge of the circuit court of the jurisdiction wherein the dispute arose shall select such third panel member. Such panel shall not be composed of any persons having direct involvement with the grievance being heard by the panel. . .

STATEMENT OF THE CASE

Petitioner, C. Mack Cain, was employed as a counselor for the Virginia Department of Rehabilitative Services in Abingdon, Virginia until August 20, 1982, when he was given a written notice of termination.[2]

Petitioner filed a grievance under Virginia Grievance Procedures for State Employees challenging his termination and also filed a complaint under 42 U.S.C. Sections 1983 and 1985 in the Federal District Court for the Western District of Virginia in which he alleged

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[2]Petitioner was a full time permanent employee of the Commonwealth of Virginia. That he had a vested property interest in his job entitling him to due process is not disputed.

constitutional deprivations in regard to his termination. Petitioner also filed a motion for a temporary restraining order requesting that the court enjoin defendant, Charles H. Merritt, the Commissioner of Client Services of the Department of Rehabilitative Services from sitting as the state's appointee on the three member grievance panel as provided by Virginia Code Ann. Section 2.1-114.5:1 (Repl. Vol. 1979 & Cum. Supp. 1983). The motion for a restraining order was based on a denial of procedural due process because of Merritt's prior participation in the decision to terminate the petitioner and partiality and bias in view of his

position with the agency.[3]

The motion for a temporary restraining order was denied and the court at that time admonished the defendants, who were all represented by counsel, to provide the petitioner with an impartial panel without any prejudgment as to what would constitute an impartial panel. (App. Below p. 14).

At the convening of the grievance panel hearing counsel for petitioner examined defendant Merritt with regard to his role in petitioner's termination and objected to his sitting as a panel member.

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[3]Merritt was not Petitioner's immediate supervisor but was in the chain of command three steps above petitioner. (App. Below p. 21).

Merritt admitted under oath that he had participated in the decision to terminate petitioner by engaging in discussions regarding the termination prior to the time Cain was in fact terminated with respondents David Ziskind, the Deputy Commissioner; James Snow, the regional director; and Kenneth Smith, Mr. Cain's immediate supervisor, by virtue of "my position in the agency and my responsibilities". (App. Below pp. 122, 123).

The following questions and answers were posed to Merritt at that time:

> Q. And you discussed what, in their opinion, he had done that required disciplinary action?
>
> A. No, not what in their opinion required a disciplinary action; what disciplinary action should be taken for what he had done. (Emphasis added.)
>
> Q. So if I understand what you have just said, you are convinced that he had done something already that required some disciplinary action?
>
> A. That was the information that had been presented and what, as I see it, we are here for

> today is to see what else can be presented. (Emphasis added) (App. Below p. 123).

Mr. Merritt was further asked "and what did you contribute to that conversation?"

> A. I contributed my impression of the proper disciplinary action.
>
> Q. So you have already participated in a discussion and have given your opinion regarding what should be done to Mr. Cain?
>
> A. At that time, yes.
>
> Q. And what did you think should be done?
>
> A. It was my impression that Mr. Cain should have been dismissed from state service without question. (App. Below p. 125).

Merritt further admitted that the outcome of the discussion was that Mr. Cain would be terminated. (App. Below p. 126).

When asked if Merritt himself viewed that as direct involvement in the termination process his response was, "I certainly see that as direct involvement in the termination process." (App. Below p. 126).

In addition, Merritt was a subordinate of David Ziskind, the Deputy Commissioner of the Virginia Department of Rehabilitative Services. Ziskind was the decisionmaker in the third step of plaintiff's grievance, a participant in the discussion with Merritt that resulted in plaintiff's termination and an agency witness at the hearing.

A divided panel, with Merritt voting in favor of his agency and superiors affirmed petitioner's

termination. There was a minority report filed with the grievance panel decision wherein panelist, William H. Robinson found that "the appointment of a member who was associated with previous actions in the case is a violation of due process..." (App. Below p. 117).

On September 29, 1983, Petitioner filed an amended complaint in federal district court including therein allegations of denial of procedural due process because of Merritt's participation on the panel and other procedural due process violations.

On September 30, 1983, petitioner filed a Motion For Summary Judgment on the ground that the panel

was not impartial thereby denying him procedural due process.

By Order entered November 4, 1983, summary judgment on the basis of the procedural due process violation was granted petitioner against respondent Merritt with backpay from the time of his dismissal. All defendants were enjoined to reinstate plaintiff to his original position and the court awarded plaintiff his attorney's fees and costs. A copy of the District Court's order and memorandum opinion is contained in the Appendix.

The respondents thereafter appealed to the Fourth Circuit Court of Appeals. The Fourth Circuit

reversed.[4]

On June 5, 1984 a second panel hearing, convened by the Commonwealth of Virginia pursuant to the order of the District Court, found in favor of petitioner and reversed his termination. The Fourth Circuit was made aware of this development at oral argument.

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[4]Additional claims were made by appellants at the Fourth Circuit level regarding Merritt's entitlement to immunity, the appropriateness of Cain's reinstatement, and the award of attorney's fees. Those issues are not dealt with here because the Fourth Circuit's decision did not address them concluding that the decision regarding Merritt's panel participation was dispositive.

BEST AVA

ARGUMENT

I. THE FOURTH CIRCUIT'S FINDING THAT RESPONDENT MERRITT WAS A QUALIFIED PANEL MEMBER DESPITE HIS PARTICIPATION IN THE DECISION BEING REVIEWED CONSTITUTES A DENIAL OF PROCEDURAL DUE PROCESS AND IS IN DIRECT CONFLICT WITH DECISIONS OF THIS COURT INCLUDING GOLDBERG v. KELLY, 397 U.S. 254 (1970).

This Court has repeatedly held that an impartial decision maker is essential to procedural due process. Goldberg v. Kelly, 90 S.Ct. at p. 1022. In Goldberg this Court went on to say that,

> prior involvement in some aspects of a case will not necessarily bar...a decision maker. He should not, however, have participated in making the determination under review. 90 S.Ct. at p. 1022.

The Fourth Circuit's reversal of the District Court's finding that

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petitioner was denied an impartial panel is in direct conflict with decisions of this Court.

Merritt's prior participation and lack of impartiality resulting from that participation cannot be questioned in view of his own admissions. In addition, actual bias was exhibited in the conduct of the panel proceeding by Merritt's rulings which resulted in the lack of disclosure of certain evidence to counsel for petitioner and the failure to consider evidence of other state employees having engaged in the activities the petitioner was accused of without any adverse

repercussions.[5]

The Fourth Circuit's opinion in finding that there was no bias on the part of Merritt also is in conflict with this Court's decision in the case of United States v. Grinnell Corporation, 384 U.S. 586 (1966). In that case this Court held that:

> ...bias and prejudice to be disqualifying must stem from an extra-judicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case. 384 U.S. at p. 583.

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[5]Merritt's actual bias is further indicated by the fact that a second panel convened by the Commonwealth of Virginia pursuant to the order of the District Court found in favor of petitioner and reversed his termination. The Fourth Circuit was made aware of this development at oral argument.

Merritt's knowledge of the case, acquired by his participation in the pre-termination and pre-grievance discussions about terminating the petitioner, are clearly extra-judicial.

This Court made it clear in the case of Withrow v. Larkin, 421 U.S. 35, 95 S.Ct. 1456 (1975) that a fair tribunal is a basic requirement of due process in administrative agency proceedings as well as the court. 421 U.S. at p. 46. This Court went on to state "not only is a biased decision maker constitutionally unacceptable but 'our system of law has always endeavored to prevent even the probability of unfairness'". (Citations omitted) 421 U.S. at p. 47.

Merritt's participation in the decision being reviewed and his position in the supervisory hierarchy above the petitioner but subordinate to agency witness and prior decision maker, Ziskind is one of those situations identified in Withrow where the "probability of actual bias on the part of the judge or decision maker is too high to be constitutionally tolerable." 421 U.S. at p. 47. Merritt's own admissions evidence a prejudgment of the issues. In response to questions from counsel Merritt stated that it was his opinion that petitioner should be terminated "without question". (App. Below p. 125). He went on to say that he was sitting on

the panel to hear "what else" could be presented. (App. Below p. 123). Merritt's statement presumes the validity and conclusions already reached and inherently denied the petitioner an impartial panel to objectively review all of the evidence.

The Fourth Circuit's opinion totally ignores the allegation of Merritt's additional bias because he was a subordinate of Deputy Commissioner Ziskind who was a witness for the agency at the panel hearing and the hearing officer in the final step of the grievance procedure prior to the panel hearing. In that capacity Ziskind had made a

determination regarding the appropriateness of the termination. The Fourth Circuit has previously outlined a seven element test for determining whether sufficient procedural safeguards existed to insure a fair and impartial hearing in an administrative proceeding. Merritt's participation violated at least two of those criteria.[6]

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[6] (1) the administrative proceedings should be "adversary in nature;" (2) the officer exercising the adjudicatory power in the administrative proceeding should not be subject to supervision or direction of other employees engaged in investigative or prosecutorial duties; (3) a party should be entitled to offer either oral or written relevant and non-repetitive evidence on his behalf; (4) the record of the proceedings should be

Merritt was subject to the supervision and direction of Ziskind who engaged in an investigative and review function in the grievance procedure and by his own admission was not in a position to give an independent and objective review of all the evidence.

Applicable Virginia law requires that the final step in a state employee grievance proceeding be a

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duly recorded, and, so recorded, should constitute the exclusive record for decision; (5) the proceedings should be so structured as to assure the exercise by the officer in his decision of independent judgment on the evidence before him; (6) the proceeding should be such as to prevent the danger of retaliatory response by the disappointed inmate to an adverse decision; and (7) there should be reasonable opportunity for the party involved to challenge by appeal the decision. Ward v. Johnson, 690 F.2d at p. 1105, 1106.

hearing before an impartial panel. (See Virginia Code Ann. Section 2.1-114.5:1(D)(4) (Cum. Supp. 1983). That section also provides that "such panel shall not be composed of any persons having direct involvement with the grievance being heard by the panel."

The Policies and Procedures Manual promulgated by the Virginia Department of Personnel and Training also contains the following provision for the makeup of the hearing panel:

> A panel shall consist of three members: one member appointed by the grievant, one member appointed by the agency and a third member selected by the other two members. Such panel shall not be composed of any persons having direct involvement with the grievance being heard, such as the grievant, supervisor

> replying at the three management steps, representatives of the grievant at the third step and witnesses who have appeared at any management step. Panels chosen in compliance with these requirements shall be deemed to be impartial.

Defendant Merritt violated both the statute and the regulation by sitting on plaintiff's panel. Merritt admitted under oath his prior determination that plaintiff should be terminated "without question". (App. Below p. 125). Merritt further admitted that he personally viewed his participation in that decision as "direct involvement in the termination process". (App. Below p. 126).

Defendants contended below that only those persons who have direct

Defendants contended below that only those persons who have direct involvement with the formal grievance procedure steps would be disqualified. Defendants' have attempted to create an artificial distinction between involvement with the technical steps of the grievance procedure by reference to the examples cited in the regulation, i.e. grievant, supervisor replying at the three management steps, witness, etc., as opposed to a person who has participated in the initial decision to terminate the grievant. Such reasoning is superficial and begs the question in regard to what constitutes an impartial panel.

The directive from the statute expressly precludes any person having

"direct involvement with the grievance being heard" by the panel. To contend that this prohibition does not exclude persons who have participated in the decision to terminate the grievant is ludicrous.

Defendants' interpretation of the regulation would improperly limit the prohibition to the examples actually listed rather than give meaning to the general prohibition with examples indicating that anyone of a similar nature would be disqualified.

The defendants also contend that Merritt exercised no authority in the decision to terminate. This contention is contrary to Merritt's own testimony that he participated in

the discussion that resulted in the decision to terminate plaintiff by virtue or his official position in the agency and made known his conclusion that the plaintiff should be terminated from state service "without question". (App. Below p. 125). Such a conclusion communicated to Merritt's subordinates as in this case is hardly without "authority". A subordinate who would ignore such a positive directive and disagree with Merritt would obviously stand to lose much stature and any hope for continuing to function in his or her current position.

Merritt's conduct is even more aggravated because Merritt's participation as a panelist was the subject of plaintiff's motion for a

restraining order because of his partiality. The court's admonition that plaintiff be given an impartial panel hearing at the hearing on the restraining order went unheeded.

While the courts do not impute bias and prejudice it is difficult to imagine how a grievant might establish a clearer case of bias when the decisionmaker's own testimony under oath describes the nature of his participation in the initial decision and places him by his own admission in a posture of having already made up his mind unless something "else can be presented". (App. Below p. 123).

The defendants' contend that "even assuming the appropriate proof of bias exists, it was not extra

judicially obtained...". (Appellant's Brief p. 21). To be disqualifying personal bias must stem from a source other than knowledge a decisionmaker acquires from participating in a case. Bowens v. North Carolina Department of Human Resources, 710 F.2d 1015 at p. 1020 (4th Cir. 1983). It must stem from an extra judicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case. Duffield v. Charleston Area Medical Center, 503 F.2d at p. 517.

Merritt's participation in the pre-termination decision and the conclusion he reached at that time and communicated to his subordinates is clearly knowledge acquired from

outside the grievance proceeding itself because it was acquired prior to the termination and obviously prior to the initiation of the grievance proceeding. That pre-termination discussion also admittedly resulted in his opinion on the merits of the case and was formed prior to and not from his actual participation in the case. For defendants to contend that this knowledge and bias was not extra judicially obtained is outrageous.

The defendants further contend that Merritt's participation did not unconstitutionally taint the proceeding and contend in their brief that "there were no allegations that the proceedings at the hearing were not essentially fair; there were no

allegations that Cain was denied an opportunity to confront all the evidence and in particular that which Merritt discussed". (Appellant's Brief p. 22). This contention misstates the obvious allegations contained in the amended complaint which was filed following the panel hearing. The plaintiff alleges constitutional deprivations because the Merritt panel refused to permit plaintiff's counsel to view and inspect the notes and file brought by defendant Mary O'Hare to the hearing and over counsel's objection the panel permitted the agency to introduce one page of a two page letter into evidence without permitting counsel to inspect the other page. The panel also permitted

the Commonwealth to withdraw from evidence materials verifying that other employees in the Department had been given permission to testify as vocational experts before the Social Security Administration which permission was denied plaintiff. (App. Below pp. 26-27).

Mr. Cain was clearly denied an opportunity to confront all the evidence and the District Court was correct in determining that Merritt's participation in fact tainted the proceeding.

CONCLUSION

The issue of what constitutes an impartial decision maker in an administrative proceeding is an important federal question. This

question has been dealt with by the Fourth Circuit Court of Appeals in a manner that is in direct conflict with the major decisions of this Court on that issue.

Without the granting of certiorari to review this case, the Goldberg requirement that an impartial decision maker is essential to due process will continue to be diluted. If the Fourth Circuit decision is allowed to stand anyone can be deemed qualified to sit as a decision maker and circumvent the requirement of impartiality by simply expressing a self-serving "desire and ability to serve as an impartial panel member." Fourth Circuit

Opinion p. 8.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA

ABINGDON DIVISION

C. MACK CAIN, Plaintiff	
v.	C.A. NO. 82-0334-A
COMMONWEALTH OF VIRGINIA, et al., Defendants	MEMORANDUM OPINION AND ORDER

The plaintiff, C. Mack Cain, brought this suit pursuant to 42 U.S.C. Sections 1983 and 1985, alleging inter alia, that he was denied procedural due process because the defendants denied him the right to an impartial tribunal in a grievance procedure held as a result of his dismissal from employment as a counselor by the Virginia Department of Rehabilitative Services and the Division of Disability Determination.

In particular, the plaintiff alleges that the defendant Merritt was permitted to act and did act as the Department's panel member notwithstanding the fact that "Merritt admitted under oath that he had participated in the decision to terminate the plaintiff and in fact recommended plaintiff's dismissal to plaintiff's supervisors who were Merritt's subordinates." Plaintiff seeks reinstatement with backpay and all other benefits, compensatory and punitive damages, costs and attorney's fees, and a permanent injunction restraining the Department of Rehabilitative Services and Division of Disability Determination from isolating the rights of disability claimants. Jurisdiction is pursuant

to 28 U.S.C. Section 1343(3) and (4). This case is before the court on plaintiff's motion for summary judgment, pursuant to Fed. R. Civ. P. 12(b) and 56, on the procedural due process issue involving Merritt's participation in the decision to terminate the plaintiff and thereafter sitting as one of the three members on the grievance panel. Defendants filed a memorandum of law in opposition to plaintiff's motion.

There is no question in this case that the plaintiff had a property interest in his job as an employee of the Department and as such was entitled to have a panel hearing after exhausting three steps of a grievance procedure. See Board of Regents v. Roth, 408 U.S. 564, 577

(1972). The grievance procedure is set out in Va. Code Section 2.1-114.5:1 (Repl. Vol. 1979 and Supp. 1983); however, a policies and procedures manual has been promulgated by the Department of Personnel and Training, and the pertinent provision involved in this case reads as follows:

> A panel shall consist of three members: one member appointed by the grievant, one member appointed by the agency and a third member selected by the other two members. Such panel shall not be composed of any persons having direct involvement with the grievance being heard, such as the grievant, supervisor replying at the three management steps, representatives of the grievant at the third step and witnesses who have appeared at any management step. Panels chosen in compliance with these requirements shall be deemed to be impartial.

Dep't of Personnel and Training Policies & Procedures Manual, Commonwealth of Virginia, Policy No. 1.06 (effective December 1, 1981).

Plaintiff contends that there is a denial of due process in this case because the Agency violated its own regulations in selecting the panel. Merritt had participated in the decision to fire the plaintiff contrary to the foregoing regulation. Consequently, the plaintiff's hearing was not conducted by an impartial tribunal since Merritt had shown his partiality by participating in the firing decision outside of the panel hearing and prior to its institution. Defendants, on the other hand contend

that Merritt is not one of the people disqualified from the impartial panel under Policy No. 1.06 and that the only people who are disqualified are those falling in the categories specifically mentioned. Furthermore, the defendants rely upon the case of Bowens v. N. C. Dept. of Human Resources, 710 F.2d 1015 (4th Cir. 1983) and contend that Bowens stands for the proposition that, regardless of any regulations or laws, an agency can violate its rules, for they are not necessary to afford due process. Moreover, any actual or alleged bias on the part of a panel member must stem from an extraneous source other than that which occurs in the hearing or from his impartial conduct at the hearing.

"An impartial decision maker is an essential element of due process." Bowens, 710 F.2d at 1020 (citation omitted; however, relying upon United States v. Grinnell Corp., 384 U.S. 563, 583 (1966), the decision in Bowens is based upon the fact that "[a]n individual is not disqualified, however, because he has formed opinions about a case based on his or her participation in it. To be disqualifying, personal bias must stem from a source other than knowledge a decision maker acquires from participating in a case." Bowens, 710 F.2d at 1020.

When considering the pertinent language in Grinnell, the case revolves around a motion to disqualify Judge Wyzanski on the

ground of personal bias and prejudice. The effort to disqualify Judge Wyzanski was based upon certain remarks which he made in the course of the trial which, it was asserted, manifested a closed mind on the merits of the case. The Court simply held that if Judge Wyzanski held an adverse attitude as a result of his study of the testimony and briefs in the case, then this attitude was not grounds for disqualifying a judge. On the other hand, grounds for disqualifying him must have occurred outside the trial of the case. Grinnell, 384 U.S. at 580-83. In this court's opinion, the Fourth Circuit's decision in Bowens stretches the decision of Grinnell to its outer limits; however, the Fourth

Circuit seems to have thought that Dr. Linville, the person alleged to have been biased, actually was not prejudiced as a result of anything that occurred outside or inside the hearing. In that case eight dentists were on a committee that heard Dr. Bowens' case and six of the eight dentists submitted affidavits showing that Dr. Bowens' dental work was professionally unacceptable. The regulations provided that all committee decisions must be made by majority vote. Prior to the hearing by the full committee, Dr. Linville had written a letter expressing disappointment over a settlement agreement that had been worked out prior to any hearing. Dr. Linville submitted an affidavit denying that

he had any personal bias or that he had attempted to sway any other committee members. Therefore, the court could have decided the Bowens case by a simple finding that there was no evidence of any bias on the part of Dr. Linville. Nevertheless, the Fourth Circuit panel in Bowens found that Dr. Bowens had not presented any evidence of Dr. Linville's bias and if there was any, it did not stem from an extraneous source and that Dr. Linville conducted himself in a proper manner at the hearing.

In another opinion, the Fourth Circuit also has said "an agency is required to comply with its regulations that are congruent with

the requirements of constitutional due process." Detweiler v. Com. of Va. Dept. of Rehab. Services, 705 F.2d 557 (4th Cir. 1983). For the foregoing rule of law the Fourth Circuit cites the case of U. S. v. Caceres, 440 U.S. 741, 749 (1979). As it broadened the language of Grinnell in Bowens, the Fourth Circuit stretched the language of Caceres to its outer boundaries. Actually, what the Supreme Court said in Caceres relating to an agency complying with its regulations, is as follows: "A court's duty to enforce an agency's regulations is most evident when compliance with the regulation is mandated by the Constitution or federal law." Id.

The question, therefore, presents itself as whether or not the United States Supreme Court or the Fourth Circuit has actually said that an agency must comply with its own regulations or it violates due process by failing to follow them. In the facts that we have before the court in this case, it is apparent that due process has been spelled out in the agency's regulations and that in this case, the Department of Rehabilitative Services has violated the dictates of Detweiler where its regulations are congruent with the requirements of constitutional due process. The agency argues in this case that it has not violated its own regulations; however, it is to be

noted that while Merritt is not one of the named persons who is disqualified, the rule does not attempt to spell out all the persons who are disqualified but uses the language "such as", not an inclusive term, which means that anyone of a similar nature would be disqualified. Therefore, this court determines that the Department did violate its own regulations when it appointed Merritt to the panel since he took an active part in the decision to fire the plaintiff in this case. This court concludes that procedural due process, as laid out in Detweiler, has been violated. Furthermore, the court is of the opinion that procedural due process, as set forth in Bowens, is violated in this case

because Merritt's bias evolved from a source outside the decision-making process of the panel hearing: He made the decision to dismiss the plaintiff before any panel or hearing was ever developed. This situation is aggravated particularly by the fact that before the panel hearing occurred in this case, the plaintiff and the defendants appeared before this court on a motion for a temporary injunction against the panel hearing on the grounds that Merritt was disqualified under the rules and regulations of the Department and that the panel was improperly constituted. This court declined to grant an injunction because plaintiff had a remedy at law in that relief can be granted after

the hearing as well as before. At that time, the court specifically admonished the parties that due process required that an impartial panel be constituted to hear the plaintiff's case. In spite of this admonishment, the defendants proceeded to try this case with a panel member who already had made up his mind by participating in the firing process. If such action constitutes due process, then it is difficult to conceive of a situation when an aggrieved person could prove a panelist to be biased. This court's opinion in this matter is bolstered by the language in the United States Supreme Court case of Goldberg v. Kelly, 397 U.S. 254 (1969), which is often cited as

authority for the proposition that due process requires that the decision maker must be impartial. In the closing remarks of the majority opinion in Goldberg. The Court stated: "We agree with the District Court that prior involvement in some aspects of a case will not necessarily bar a welfare official from acting as a decision maker. He should not, however, have participated in making the determination under review." Id. at 271.

The foregoing language fits Merritt like a glove. He did participate in making the determination under review by the panel; therefore, he was disqualified under the Department's regulations,

he was partial, and he should not have sat on the panel. Consequently, the plaintiff was denied procedural due process at the grievance hearing. Accordingly, plaintiff's motion for summary judgment is granted.

The court requested counsel on each side to present any authorities as to the relief that can be granted in this case, and neither side has furnished the court this authority. The defendants contend that they are all immune from monetary damages because they are sued in their official capacities as state employees. There is not question that that the Commonwealth of Virginia, which is sued as an entity, is immune from compensatory damages under the eleventh amendment to the

United States Constitution. Hans v. Louisiana, 134 U.S. 1 (1890); Parden v. Terminal Railway, 377 U.S. 184 (1964). It is well established that suits brought against an agency of the state are in fact suits against the state and covered by the eleventh amendment. Ford Motor Co. v. Dep't. of Treasury, 323 U.S. 459 (1945); Employees v. Dep't. of Public Health and Welfare, 411 U.S. 279 (1973), and that the amendment bars equitable relief as well as monetary damages. Edelman v. Jordan, 415 U.S. 651 (1974). However, it has been held that even the governor of a state is liable for money damages and does not enjoy the absolute immunity of his sovereign. Members of the executive branch have a qualified or good faith

immunity, depending upon the discretion and responsibilities of the office and the circumstances surrounding the event. "It is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good-faith belief, that affords a basis for qualified immunity of executive officers for acts performed in the course of official conduct." Scheurer v. Rhodes, 416 U.S. 232, 247-48 (1974). The Supreme Court later determined that the qualified immunity was not available if the official "knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the

[person] affected, or if he took the action with the malicious intent to cause a deprivation of constitutional rights or other injury to the [person]." Wood v. Strickland, 420 U.S. 308, 322 (1975). See Cruz v. Beto, 603 F.2d 1178 (5th Cir. 1979).

This court concludes that under the circumstances of this case defendant Merritt certainly did not act in good faith when he sat on the panel, especially after the court admonished him to provide the plaintiff an impartial panel. It is notable that as Commissioner of Client Services of the Virginia Department of Rehabilitative Services, Merritt is plaintiff's superior. Merritt's actions were damaging to plaintiff.

In considering what relief should be afforded to the plaintiff, the court notes that the plaintiff admitted in the grievance hearing that he had not followed departmental policy. The plaintiff did rely upon mitigating circumstances in an effort to have his punishment reduced to something other than firing: The mitigating circumstances were his reliance upon an opinion of an assistance attorney general of Virginia, and his utilization of leave time rather than time from his work for the Department. There does not appear to be any evidence in the record that the plaintiff was not a good employee, and the only thing that did wrong was to serve as a witness in social security cases

which Merritt believed was a conflict of interests. An assistant attorney general, however, thought it was not a conflict of interests. Thus, an impartial panel could have found that probation or reprimand or suspension or some lesser remedy than dismissal would have been a proper punishment. Yet before the hearing Merritt already had decided that firing the plaintiff was the only appropriate remedy. Consequently, defendant Merritt is responsible for the plaintiff's dismissal. He is not entitled to a qualified immunity and is not absolutely immune; therefore, judgment is rendered in monetary damages against the defendant Merritt alone for backpay for the plaintiff from the time he was fired up until

this date. Injunctive relief is granted against all the defendants, and they are directed to reinstate the plaintiff in his original position as of the date of this opinion. It further is adjudged that an entirely new, impartial panel be chosen and that the plaintiff be granted a de novo hearing. An order will be entered in accordance with this opinion.

The Clerk of this court is directed to send certified copies of this Memorandum Opinion to counsel of record.

ENTER: This 4 day of November, 1983.

/s/ Glen M. Williams
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 83-6645

C. Mack Cain,

Appellee,

v.

The Commonwealth of Virginia; Joseph L. Fisher; Altamont Dickerson, Jr.; Charles H. Merritt; James V. Snow; Harold W. Billings; Kenneth D. Smith; Mary O'Hare,

Appellants

Appeal from the United States District Court for the Western District of Virginia, at Abingdon. Glen M. Williams, district Judge. (C/A 82-0334-A)

Argued: August 10, 1984
Decided: October 5, 1984

Before RUSSELL, HALL and CHAPMAN, Circuit Judges.

Neil A. G. McPhie, Assistant Attorney General (Gerald L. Baliles, Attorney General of Virginia, James T. Moore, III, Senior Assistant Attorney General, Phyllis C. Katz, Assistant Attorney General on brief) for Appellants; Mary Lynn Tate (Yeary & Tate, P.C. on brief) for Appellee.

PER CURIAM:

The Commonwealth of Virginia, Charles H. Merritt, Assistant Commissioner of Client Services of the Department of Rehabilitative Services ("Department"), and others[1/]

[1/]Other appellants are: Joseph L. Fisher, Secretary, Department of Human Resources; Altamont Dickerson, Jr., Commissioner of the Department; James V. Snow, Regional Director of the Department; Harold W. Billings, Program Supervisor of the Department; Kenneth D. Smith, Program Supervisor of the Department; and Mary O'Hare, Southwest Regional Office Director.

appeal from the district court's orders granting summary judgment for and attorney's fees to C. Mack Cain in this action brought pursuant to 42 U.S.C. Sections 1983 and 1985. We reverse.

I.

In April, 1982, Cain, who was employed by the Department as a counselor, requested the Department's permission to engage in outside employment as a vocational expert. His request was denied on the basis that such outside work would constitute a conflict of interest. Cain then sought and obtained the opinion of the Virginia Attorney General's Office that such employment would not constitute a conflict of interest. He

subsequently proceeded to engage in such employment.

When the Department learned that Cain had engaged in outside employment, it conducted an investigation. The investigation confirmed that on two occasions Cain had testified in cases before administrative law judges of the Social Security Administration in West Virginia, that he was compensated for each of these appearances, that they occurred during his normal working hours, and that he left the work site without permission.

Subsequently, the matter concerning Cain was brought up in an informal conversation during a coffee

break at a routine meeting of Department supervisors. At that meeting Merritt expressed his opinion that Cain should be terminated.

On August 20, 1982, Cain was given a written notice of and reasons for his discharge. That same day, he initiated a grievance. After the decision to terminate him was upheld at three successive management steps, Cain requested a hearing. In accordance with the grievance procedures,[2/] Cain designated a

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[2/] The Code of Virginia provides that the final step of a grievance shall be a hearing composed of an "impartial panel . . . to consist of one member appointed by the grievant, one member appointed by the agency head and a third member selected by the first two. . . . Such panel shall not be composed of any persons

(footnote cont'd)

having direct involvement with the grievance being heard. . . ." VA. CODE Section 2.1-114.5:1(D) (Supp. 1983). Policy No. 1.06 of the Department's General Policies regarding grievance panel hearings states that:

> A panel shall consist of three members: one member appointed by the grievant, one member appointed by the agency and a third member selected by the other two members. Such panel shall not be composed of any persons having direct involvement with the grievance being heard, such as the grievant, supervisor replying at the three management steps, representatives of the grievant at the third step and witnesses who have appeared at any management step. Panels chosen in compliance with these requirements shall be deemed to be impartial.

member of the grievance panel, and the Department selected Merritt as its panel member. A third member and chairman of the hearing was chosen by the other two members. Merritt conferred with the Attorney General's Office and the Department of Personnel and Training concerning his eligibility to sit on the panel. Both sources determined Merritt to be an eligible panel member.

Before the panel convened, Cain filed this civil rights action under 42 U.S.C. Sections 1983 and 1985 and sought a temporary restaining order to enjoin the grievance hearing. Cain claimed that Merritt was not an impartial panel member, alleging that Merritt had participated in the decision to terminate Cain. The

motion for temporary relief was denied, although the district court admonished defendants to give Cain an impartial hearing.

The hearing on Cain's termination commenced on December 14, 1982. Before any evidence was taken, Merritt testified that he believed he could make a fair and impartial decision based on the information to be presented to the panel.[3/] The

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[3/] Answers given by Merritt to questions posed by his counsel indicate Merritt's lack of bias.

> Q. Are you personally acquainted with the Grievant?
>
> A. Yes, I am.
>
> Q. Do you have any personal vendetta against him or any personal dislike of him?

(footnote, cont'd)

A. No.

Q. Did you make the decision to terminate Mr. Cain?

A. No.

Q. Do you believe that you can fairly and impartially make the decision. . . . engage in a panel decision based on the facts presented here today?

A. Yes, I think I can make a fair and impartial decision based on the information presented here.

Merritt's reply to questioning by counsel for Cain on cross-examination further reinforces Merritt's lack of partiality.

Q. And let me ask you one more question. From what you have said you are of the opinion that we are here today to see if anything else can be offered rather than to review all of those factual circumstances?

A. Well, I see it as both. I think obviously. . . .I would hope there will

(footnote cont'd)

be a complete review of what has transpired, and I would suspect and hope, certainly for the Grievant, that it he has additional information that, you know, that will be presented.

Chairman of the panel determined that, although state policy and procedures preclude an individual from serving on a grievance panel if he has been involved in any of the steps in the grievance procedure, Merritt's involvement occurred before the filing of the grievance and that, therefore, Merritt was a duly authorized member of the panel. Following the hearing, the panel issued a 2-1 decision upholding the Department's termination of Cain[4/].

After receiving the adverse panel decision, Cain filed an amended

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[4/] The panel member designated by Cain issued a dissenting opinion based on the severity of the punishment, and the appearance of unfairness because of Merritt's membership on the panel.

complaint in which he alleged a deprivation of due process based upon Merritt's participation on the panel and moved for summary judgment on this ground alone. The district court granted Cain summary judgment, reinstated him to his former position pending the appointment and decision of a new grievance panel, directed Merritt to pay Cain back wages from the date of his dismissal, and awarded Cain his attorney's fees and costs. This appeal followed.

II.

Appellants contend that the district court erred in holding that the Virginia grievance procedure and Cain's due process rights were violated by Merritt's participation

on Cain's grievance panel.[5/] We agree.

We do not perceive any due-process violation as a result of Merritt's participation on Cain's grievance panel. Merritt did not make the decision to terminate Cain. There is no evidence to suggest that Merritt's expression of his opinion at the pre-termination conversation had any binding effect upon those who did make the initial decision to

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[5/] Appellants make additional claims regarding Merritt's entitlement to immunity, the appropriateness of Cain's reinstatement, and the award of attorney's fees. These claims will not be addressed in this opinion, as our decision regarding Merritt's participation on the panel is dispositive.

terminate Cain. Merritt simply offered an opinion based upon the evidence presented to him at that time. This action does not disqualify him from later review of the termination in the light of all the evidence. Cf. Morris v. City of Danville, ___F.2d ___, No. 84-1161 (4th Cir. ____) (city manager who made initial decision to dismiss an employee not precluded from thereafter reviewing that termination, absent showing of bias); Bowens v. N. C. Department of Human Resources, 710 F.2d 1015 (4th Cir. 1983) (dentist's expression in letter of disappointment with a settlement entered into between plaintiff and state medical agency did not evince bias or partiality to prohibit him from subsequently serving on

plaintiff's review committee); Duffield v. Charleston Area Medical Center, Inc., 503 F.2d 512 (4th Cir. 1974) (board members who approved recommendation to withdraw a physician's hospital privileges not preclude from later participating on the committee which decided the appeal of that withdrawal).

Cain asserts that Merritt's familiarity with the case stems from an extrajudicial source and is, therefore, disqualified under United States v. Grinnell, 384 U.S.563 (1966). We disagree. Even if Merritt's knowledge of Cain's alleged offense is considered to have been

extrajudicially obtained,[6/] there is no evidence that such knowledge created personal bias on the part of Merritt. Merritt's testimony prior to the convening of the grievance hearing does not suggest bias. To the contrary, the answers given by Merritt to the questions posed by counsel evince his desire and ability to serve as an impartial panel member. Additionally, any hazard arising out of the potential for such bias was alleviated by the fact that

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[6/] The district court's determination on this matter is contradictory. On the one hand it finds Merritt to be disqualified from panel membership on the basis of his alleged direct involvement with the grievance yet, on the other, finds Merritt's alleged personal bias to have arisen from an extra-judicial source.

all three members of the grievance panel were, at the hearing, made aware of all of the same information heard by Merritt during the pre-termination discussion.

Similarly, we do not find Merritt to have been precluded from panel membership under the Virginia grievance procedure. An administrative agency's interpretation of a regulation it administers is to be given significant deference by the courts. New York State Department of Social Services v. Dubino, 413 U.S. 405, 421 (1973). In the present case, Merritt inquired of the Department of Personnel and Training and the Attorney General's Office as to whether he was disqualified from

participating on the panel. Both the Department of Personnel and Training and the Attorney General's Office determined that Merritt's pre-termination discussion did not fall within the statute or regulation governing disqualification. There is nothing to indicate that this interpretation is incorrect. The district court should have accorded this interpretation great deference, Dubino, supra, and held Merritt to be a proper panel member.

For the foregoing reasons, we conclude that Merritt was not biased, and was a proper panel member. Accordingly, the orders of the district court are reversed.

REVERSED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 83-6645

C. Mack Cain,

Appellee,

versus

The Commonwealth of Virginia, et al.

Appellants.

Appeal from the United States District Court for the Western District of Virginia, at Abingdon. Glen M. Williams, District Judge.

The appellee's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of the Court requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Judge Hall, with the concurrence of Judge Russell and Judge Chapman.

For the Court,

JOHN M. GREACEN
CLERK

Office-Supreme Court, U.S.
FILED
MAY 13 1985
ALEXANDER L. STEVAS,
CLERK

(2)

No. 84-1374

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1984

C. MACK CAIN,
Petitioner,

v.

THE COMMONWEALTH OF VIRGINIA, et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES SUPREME COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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No. 84-1374

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1984

C. MACK CAIN,

Petitioner,

v.

THE COMMONWEALTH OF VIRGINIA, et al.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents, The Commonwealth of Virginia, et al., respectfully request that this Court deny the petition for a writ of certiorari, which seeks review of the Fourth Circuit's order in this case.

OPINIONS BELOW

The opinion in which certiorari is sought is not reported. A copy of that opinion appears at Pet. app. 24a.

The opinion of the district court (Pet. App. 1a) is reported at 574 F.Supp. 559 (W.D. Va. 1983).

JURISDICTION

The judgment of the Fourth Circuit was entered on October 5, 1984, and a petition for rehearing and suggestion for rehearing en banc was denied on November 16, 1984. (Pet. App. 24a & 42A). A petition for a writ of certiorari was first filed on January 16, 1985. Subsequent filings were made on January 23, 1985, and March 1, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

QUESTION PRESENTED

Whether The Court Of Appeals Erred In Its Holding That Constitutional Due Process And The Virginia Grievance Procedure Were Not Violated When The Agency Appointee To The Grievance Panel Had Participated In A Pre-Termination Discussion But Had Exercised No Authority In The Subsequent Termination Or Grievance.

STATEMENT OF FACTS

Petitioner was employed by the Virginia Department of Rehabilitative Services as a counselor. In April, 1982, he requested the Department's permission to engage in outside employment as a vocational expert. (App. at 106). His request was denied on the basis that such outside employment would constitute a conflict of interests. (Id.). Unknown to the Department, petitioner then sought and obtained the informal opinion of the Virginia Attorney General's Office that such employment during vacation or leave time, and limited to inactive departmental cases, would not constitute a conflict of interests. The opinion directed Petitioner to seek the necessary departmental approval before engaging in such outside employment. (App. at 96). Nonetheless, petitioner subsequently engaged in such employment during work hours, without taking annual leave, and without getting departmental approval. (App. at 99-105). Such activity, if proved, would constitute serious infractions of the Employee Standards of Conduct and could result in termination. (App. at 86-87).

When the Department learned that petitioner had engaged in outside employment, it conducted an investigation. (App. at 99-105). The investigation confirmed that on two occasions petitioner had testified in cases before Administrative Law Judges of the Social Security Administration in West Virginia, that he was compensated for each of these appearances, that they occurred during his normal working hours, and that he had left his work site without permission. (Id.).

Subsequently, the matter concerning petitioner was brought up in an informal conversation during a coffee break at a routine meeting of departmental supervisors. These were John Bergeron, Director of Personnel and Training, David Ziskind, Deputy Commissioner, Charles H. Merritt, an Assistant Commissioner, James Snow, Regional Director, and Kenneth Smith, petitioner's immediate supervisor. The group reviewed the written material at that time, prepared by both agency personnel and by petitioner, and offered their views as to appropriate discipline. Merritt offered his opinion that, on the basis of the material he saw, petitioner should be

terminated. Only Kenneth Smith had the responsibility to make the initial decision regarding disciplinary action. (App. at 121-129, 136-140).

On August 20, 1982, petitioner was given a written notice of the reasons for his discharge. The notice was signed by his immediate superior, Mr. Smith. (App. at 109). That same day, petitioner initiated a grievance.[1] The decision to terminate was upheld at three successive management steps by agency officials other than Merritt. The three management steps in this case involved (1) petitioner's immediate supervisor, Kenneth Smith; (2) the next direct level of management, James Snow, Region I Director; and, finally, (3) Mr. David Ziskind, Deputy Commissioner. (App. at 112).

Merritt holds the position of Assistant Commissioner. In that capacity, he is required to provide the Deputy Commissioner with the agency documentation pertinent to contemplated personnel action. This documentation is then

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[1]The State Grievance Procedure is set forth at § 2.1-114.5:1, Code of Virginia, 1950, as amended.

independently reviewed and a decision rendered by the Deputy Commissioner or Commissioner. Merritt met this responsibility by giving documentation relevant to petitioner's termination to the Deputy Commissioner. Merritt neither had nor exercised authority over the decision of the Deputy Commissioner to sustain the termination of petitioner in the third management step of the State Grievance Procedure. (App. at 136-138). John Bergeron, Director of Personnel, has the authority to review all recommended terminations for consistency and mitigating circumstances. (App. at 82).

After the decision to terminate was upheld at three successive management steps, petitioner requested a hearing. In accordance with the grievance procedures, petitioner designated a member of the grievance panel, and the Department selected Merritt as its panel member. (App. at 116). Merritt conferred with the Attorney General's Office and the Department of Personnel and Training concerning his eligibility to sit on the panel. Both sources determined Merritt to be an eligible panel member. (App. at 132, 135).

Before the panel convened, petitioner filed a civil rights action under 42 U.S.C. §§ 1983 and 1985, seeking a temporary restraining order to enjoin the grievance hearing. (App. at 10). Petitioner claimed that Merritt was not an impartial panel member, alleging that Merritt had participated in the decision to terminate petitioner. The motion was denied. (App. at 14).

The grievance hearing on petitioner's termination commenced on December 14, 1982. Before any evidence was taken, Merritt testified that he could make a fair and impartial decision based on the information to be presented to the panel. (App. 121-122, 125). This testimony was unrebutted. The Chairman of the panel determined that the State policy and procedures preclude an individual from serving on a grievance panel if one has been involved in any of the steps in the grievance procedure, Merritt's involvement occurred prior to the filing of the grievance and therefore, Merritt was a duly authorized member of the panel. (App. 129-130). The hearing then proceeded.

The hearing consisted of approximately 21 hours of testimony over three days during which both sides were represented by counsel. Exhibits were presented and witnesses examined. On January 3, 1983, the panel issued a decision upholding the termination. The majority decision stated that the

> Evidence presented did not substantiate grievant's claims or beliefs. Mr. Cain testified he did not report leave, but he did appear as a vocational expert in Princeton, West Virginia, on the days in question and that he did have a meeting with his supervisor concerning his violations of the Standards of Conduct. (App. at 116).

Petitioner's panel member issued a dissenting opinion based on the severity of the punishment, and the appearance of unfairness by virtue of Mr. Merritt serving on the panel. The dissenter stated that he "agreed with the reasons for the decision" and that he did "not question the integrity of Mr. Merritt...." (App. at 117).

After receiving the adverse panel decision, petitioner filed an Amended Complaint in which he alleged a deprivation of due process based upon Merritt's participation on the panel

and moved for summary judgment. The District Court reasoned that any prior participation by Merritt in the facts under review by the grievance panel deprived petitioner of an impartial panel. The Court granted summary judgment, reinstated petitioner to his prior position pending the appointment and decision of a new grievance panel, directed Merritt, not the agency, to pay petitioner back wages from the date of his dismissal and awarded petitioner his attorney's fees and costs. (App. at 31, 65).

The Fourth Circuit reversed. That Court refused to adopt the per se rule on bias of the District Court. Based on its review of the record, the Court concluded that Merritt did not make the decision to terminate petitioner and did not influence those who did. The Court determined that there was no evidence of actual bias on Merritt's part; rather, the evidence demonstrated Merritt's impartiality. Accordingly, Merritt could sit on the panel. The Court determined that the panel made its decision based on a review of all the evidence, including that which Merritt had seen earlier. The Court also concluded that the record was devoid of any

indication that the Office of the Attorney General and the Department of Personnel and Training erred in their assessment that Merritt could sit.

ARGUMENT

MERRITT'S SITTING ON PETITIONER'S GRIEVANCE PANEL WAS NOT PROHIBITED BY THE DUE PROCESS CLAUSE OF THE CONSTITUTION OR THE GRIEVANCE PROCEDURE.

Petitioner essentially asks this Court to do three things, none of which is a basis for review: (1) to overlook settled principles as constitutional law and, in their place, to adopt a rule that prior involvement with the facts under review is per se impermissible; (2) disregard uncontested findings of the Fourth Circuit and to conclude, based on petitioner's slanted version of the record, that the agency panel member was biased; and (3) to disregard the consistent interpretation Virginia has given its grievance procedure regarding the composition of grievance panels.

1. There Was No Violation Of The Due Process Clause Of The Constitution.

Petitioner's arguments are based on two erroneous conclusions of law: (1) a decision maker cannot review his own decision under Goldberg v. Kelly, 397 U.S. 254 (1970);

and (2) the information which Merritt had from his pre-termination discussion was knowledge from an "extra judicial source" and, under United States v. Grinnell Corporation, 384 U.S. 563 (1966), amounted to impermissible bias.

a. Review Of A Decision By The Decision Maker

It is undisputed that Merritt participated in one informal pre-termination discussion during which he stated that petitioner should be terminated. In Goldberg v. Kelly, supra, 397 U.S. at 271, this Court remarked in closing that a decision maker should not participate in making the determination under review. In Withrow v. Larkin, 421 U.S. 35, 58 n.25 (1975), this Court explained that "when review of an initial decision is mandated, the decision maker must be other than the one who made the initial decision." The Fourth Circuit held that Merritt did not make the decision to terminate. This conclusion is supported by the evidence. Smith recommended termination. (App. at 109). Ziskind terminated petitioner after independently reviewing the investigative facts. (App. at 137). Bergeron reviewed the

decision for consistency and mitigation. (App. at 82). Furthermore, the grievance panel does not sit as an appeal board, see, Va. Code § 2.1-114.5:1(D)(4), and therefore, under Withrow, could in fact be composed of individuals who may have participated in the initial decision under review. See e.g., Hortonville Joint School Dist. No. 1 v. Hortonville Education Assn., 426 U.S. 482, 493 (1976); Vanelli v. Reynolds School District No. 7, 667 F.2d 773, 780 n.12 (9th Cir. 1982); Obrien v. Digrazia, 544 F.2d 543, 546-547 (1st Cir. 1976); Fuentes v. Roher, 519 F.2d 379, 388 (2nd Cir. 1975). Moreover, the Fourth Circuit found no evidence to suggest that Merritt's statement had any binding effect on Smith, Ziskind or Bergeron.

Even if Merritt's opinion could be considered a decision, this Court has held that administrators may review their prior administrative decisions without violating an individual's due process rights. Withrow, supra, 421 U.S. at 35. In Withrow, the Court held that mere exposure to evidence in non-adversarial proceedings is insufficient to disqualify an administrator from later participating in the

adversarial hearing. 421 U.S. at 55. The Court held there is no incompatibility between an agency filing a complaint of probable cause and a subsequent decision on the merits. Withrow, supra, at 57. To adopt a rule which would absolutely bar an adjudicator from deciding a matter with which he was previously involved would bar "any judge who ruled on a motion for a temporary restraining order in a civil action or a motion for bail in a criminal case ... from later hearing the case." Duffield v. Charleston Area Medical Center, Inc., 503 F.2d 512, 517 (4th Cir. 1974). The governing rule, which the Fourth Circuit followed, is that absent evidence of actual bias, an adjudicator is not disqualified simply because of prior involvement with the decision under review.

b. Bias

Petitioner slants Merritt's testimony to make it appear that Merritt had already made up his mind to terminate petitioner prior to the panel hearing, regardless of the evidence presented. Merritt's open-mindedness, which the

Fourth Circuit found persuasive, is well documented in his testimony. On direct examination he testified as follows:

> Q. Are you personally acquainted with the grievant?
>
> A. Yes, I am.
>
> Q. Do you have any personal vendetta against him or any personal dislike of him?
>
> A. No.
>
> Q. Did you make the decision to terminate Mr. Cain?
>
> A. No.
>
> Q. Do you believe that you can fairly and impartially make the decision ... engage in a panel decision based on the facts presented here today?
>
> A. Yes, I think I can make a fair and impartial decision based on the information presented here. (App. at 121-122).

Merritt's reply to questioning by counsel for petitioner on cross examination further reinforces Merritt's lack of partiality:

> Q. And let me ask you one more question. From what you have said, you are of the opinion that we are here today to see if anything else can be offered rather than to review all of those factual circumstances?

A. Well, I see it as both. I think obviously that ... I would hope there would be a complete review of what has transpired, and I would suspect and hope, certainly for the Grievant, that if he has additional information that, you know, that will be presented. (App. at 125).

Petitioner submits that Merritt's one pre-termination statement does not vitiate his statements of impartiality at the time of the panel hearing. Petitioner did not meet his burden of proof to show actual bias.[2] See, Schweiker v. McClure, 456 U.S. 188, 196 (1982).

Merritt's initial knowledge of the case stemmed from exposure to investigative findings prior to the panel hearing. On this basis, petitioner contends that he was prejudiced from an extra-judicial source. In the first place there was no prejudice. Moreover, petitioner's contention ignores the fact that the findings were incorporated into the written notice issued to petitioner and were presented verbatim to the

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[2]Petitioner contends that Merritt's partiality is evident from the fact that a second panel reinstated him. The second panel was convened pursuant to the district court's order and is of no legal significance. Moreover, under the Virginia Grievance Procedure a panel decision is final and binding. See, Virginia Code § 2.1-114.5:1(D)(4), 1950 as amended.

entire panel during three days of testimony. This contention also ignores the case law which has refused to categorize the knowledge gained through prior administrative involvement in a matter as "extra judicial".[3] The contention also would prohibit any employee, with any knowledge of a case, gained through the employment relationship, from sitting on panels. Such a result would essentially dismantle the grievance procedure and is not required for due process.

c. Merritt's Participation on the Panel Did Not Unconstitutionally Taint the Proceeding.

The essential fairness of the hearing petitioner received is manifest. Petitioner had at least four opportunities to confront all the evidence administratively as well as three days of panel hearings during which each witness for the Department was fully cross examined. (App.

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[3]See, e.g., Bowens v. North Carolina Department of Human Resources, 710 F.2d 1015 (4th Cir. 1983), Wolkenstein v. Reville, 694 F.2d 35 (2nd Cir. 1982), cert denied, __ U.S. __, 102 S.Ct. 2452, 77 L.Ed.2d 1333 (1983), Hoska, III v. United States Department of Army, 694 F.2d 270 (D.C. Cir. 1982), PATCO v. FLRA, 685 F.2d 547 (D.C. Cir. 1982), Vanelli v. Reynolds School District, supra, 667 F.2d 773, Nevels v. Hanlon, 656 F.2d 372 (8th Cir. 1981).

at 101, 106, 112). Nonetheless, petitioner contends that Merritt's presence tainted the panel because petitioner was denied an opportunity to confront all the evidence. In support of this contention, petitioner points to certain evidentiary submissions which the panel refused in whole or in part. These allegations do not demonstrate prejudice. The underlying submissions of which petitioner complains were denied by a unanimous panel. (R. Vol. 1, No. 12, pp. 42-46). Moreover, the lower court made no findings that the panel's conduct was improper. Accordingly, the Fourth Circuit correctly concluded "any hazard arising out of the potential for such bias was alleviated by the fact that all three members of the grievance panel were, at the hearing, made aware of all the same information heard by Merritt during the pre-termination discussion." See Vanelli, supra, 667 F.2d at 780.[4]

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[4]Petitioner contends that Ziskind's presence as an agency witness tainted the panel under Withrow v. Larkin, supra, and Ward v. Johnson, 690 F.2d 1098 (4th Cir. 1982). Ziskind had no investigative or prosecutorial duties. Although he made the decision to terminate and acted as third step management official, he neither investigated nor prosecuted. Billings and (Continued)

2. There was no Violation of the Grievance Procedure

The Fourth Circuit noted that there was nothing to suggest that opinions of the Attorney General and the Department of Personnel and Training that Merritt could sit were incorrect. Accordingly that Court gave the opinions great deference. The evidence supports the correctness of the ruling.

The grievance procedure does not prohibit persons who have participated in the underlying facts of a grievance from sitting on a panel; the statute and the implementing regulations expressly prohibit persons with direct involvement in the grievance itself from sitting on a panel. See, Virginia Code § 2.1-114.5:1(D)(4), 1950, as amended; (App. at 91).[5]

Smith investigated and Assistant Attorney General Flippen represented the agency. (App. at 99). Thus, there is no evidence that Merritt was influenced by persons engaged in investigative and prosecutorial functions. Moreover, there is no evidence to suggest that Ziskind's appearance or conduct at the hearing influenced Merritt.

Petitioner also contends that the trial court admonished Merritt not to sit. The court denied petitioner's motion suggesting that his participation was proper (App. at 10) and explicitly refused to tell Merritt he could not sit. (App. at 45).

[5]Section 2.1-114.5:1(D)(4) states in part, "such panel shall not (Continued)

The regulations identified the directly involved individuals to be the grievant, supervisors hearing the grievance at the three management steps, representatives of the grievant at the third step, and witnesses who have appeared at any management step. (App. at 91).

The Virginia Code defines a grievance as a dispute or complaint by an employee relating to, among other things, disciplinary actions taken by the agency. Virginia Code § 2.1-114.5:1(A), 1950, as amended.

Accordingly, persons who participated in petitioner's grievance after it was filed on August 20, 1982, would be prohibited from sitting on the panel. Merritt is not such a person. He was not a supervisor replying at any management steps or witness at any management step. Although he participated in a single impromptu pre-termination discussion pertaining to the agency's investigative facts and the

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be composed of any persons having direct involvement with the grievance being heard by the panel." The regulations provide in part, "such panel shall not be composed of any person having direct involvement with the grievance being heard, such as a grievant's supervisor replying at the three management steps, representatives of the grievant at the third step and the witnesses." (App. at 91).

available disciplinary actions, such participation does not preclude him from sitting on the panel. Indeed, it could not, under any interpretation, be "participation in a grievance," because there was no grievance until after petitioner's dismissal.[6] Merritt's participation occurred prior to petitioner's initiation of the grievance, was therefore not "direct involvement in the grievance," and was permitted under the statute.

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[6]A grievance is statutorialy defined as "a complaint or dispute by an employee relating to ... disciplinary actions, including dismissals ...." Hence, a discussion before the dismissal giving rise to a grievance simply cannot be "direct involvement in the grievance." See, § 2.1-114.5:1(A), 1950 as amended.

CONCLUSION

For the reasons stated above, respondents request that the decision of the Circuit Court be affirmed and the petition for certiorari be denied.

Respectfully submitted,

COMMONWEALTH OF VIRGINIA,
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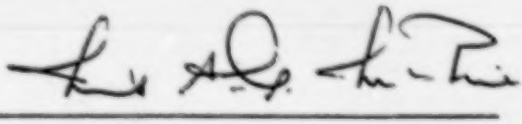
CERTIFICATE

In accordance with Rule 28 of the Rules of the United States Supreme Court I hereby certify that three copies of the foregoing Brief for the Respondents In Opposition were mailed, postage prepaid, this 10th day of May, 1985, to Mary Lynn Tate, Esquire, Yeary & Tate, P.C., 161 East Main Street, Abingdon, Virginia 24210, counsel for petitioner.



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